UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GEORGE JORDAN,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Civil No. 98-442-P-H***
	)	
JAKE MENDEZ, Warden,	***)***	
FCI-Allenwood, PA., et al.,	***)***	
	)	
Respondents	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, appearing *pro se*, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in connection with his anticipated retrial in Maine on a charge of reckless conduct with the use of a dangerous weapon in violation of 17-A M.R.S.A. §§ 211 and 1252(4). *See generally* Petition To Stay State of Maine Proceedings Pursuant to 28 U.S.C. § 2251, To Issue Protective Order Pursuant to Habeas Corpus Proceedings and Federal Rule of Appeal No.: 23, and To Issue a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, et. seq. ("Petition") (Docket No. 1(a)). Inasmuch as I find that the court lacks subject-matter jurisdiction to entertain the petition, I recommend that it be dismissed.[1]

[1]Were the court to accept my recommendation, it likewise would have no power to act upon pending related motions, including those contained within the petition for a stay, a protective order and appointment of counsel, Petition at 2-3; Motion for Judicial Notice and Expedited Court Review of Motion for 28 U.S.C. § 2251 Stay, etc. ("Judicial Notice Motion") (Docket No. 1(c)); and Petitioner's Motion To Strike, etc. (Docket No. 5).

I. Background

On or about July 13, 1994 George Jordan was indicted in the Maine Superior Court, Cumberland County, on two counts arising from the alleged use of a shotgun against the person of Todd Barlow in South Portland, Maine in April 1994. Indictment, *State v. Jordan,* Criminal No. 94-1025 (Me. Super. Ct.), attached to Response to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Response") (Docket No. 3).[2] Specifically, Jordan was indicted on one count of criminal threatening with the use of a dangerous weapon, a Class C crime, in violation of 17-A M.R.S.A. §§ 209 and 1252(4), and one count of reckless conduct with the use of a dangerous weapon, a Class C crime, in violation of 17-A M.R.S.A. §§ 211 and 1252(4). *Id.*

Following a jury trial in August 1995 Jordan was acquitted of criminal threatening but convicted of reckless conduct, for which the Superior Court sentenced him to three years of imprisonment. *See Jordan I* at 930; *State v. Jordan,* 716 A.2d 1004, 1005 & n.1 (Me. 1998) ("*Jordan II*"). On May 15, 1997 the Law Court on direct appeal vacated Jordan's conviction and remanded the case for proceedings consistent with its opinion that the Superior Court had committed reversible error in permitting testimony at trial of prior bad acts. *Jordan I* at 931-32. The case was returned to the Superior Court trial list. *See* Docket, *State v. Jordan,* Criminal No. 94-1025 (Me. Super. Ct.) ("Superior Court Docket"), attached to Letter from Charles K. Leadbetter to Susan L. Hall dated September 20, 1999 ("Leadbetter Letter"), entry of May 16, 1997.

On or about September 24, 1997 Jordan moved in Superior Court to dismiss the reckless-conduct charge on double-jeopardy or mootness grounds, observing that he had by then completed

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[2]The charges stemmed from an incident in which several South Portland police officers, including Barlow, made a forcible entry into Jordan's darkened apartment. *See State v. Jordan,* 694 A.2d 929, 930-31 (Me. 1997) ("*Jordan I*").

service of his entire sentence.[3] *See* Motion To Dismiss, Double Jeopardy and Incorporated Memorandum, *State v. Jordan*, Criminal No. 94-1025 (Me. Super. Ct.), attached to Response. Jordan was at that time incarcerated in federal prison in Allenwood, Pennsylvania, serving an unrelated federal sentence for mail fraud and money laundering. *Id.* at 2 n.1. The Superior Court granted the motion on mootness grounds. Order on Motion To Dismiss, *State v. Jordan*, Criminal No. 94-1025 (Me. Super. Ct. Oct. 21, 1997), attached to Response. The State appealed, and Jordan cross-appealed the denial of his motion on double-jeopardy grounds. *Jordan II* at 1005. On July 14, 1998 the Law Court vacated the judgment of the Superior Court, remanding the case once more for proceedings consistent with its opinion rejecting both Jordan's mootness and double-jeopardy arguments. *Id.* at 1006-07. Jordan petitioned the United States Supreme Court for a writ of certiorari, which was denied on November 16, 1998. Letter from William K. Suter, Clerk, to David Beneman dated November 16, 1998, attached to Judicial Notice Motion. The case was again slated to be placed on the Superior Court trial list. *See* Superior Court Docket, entry of November 20, 1998.

On November 30, 1998 Jordan — still incarcerated in Allenwood, Pennsylvania — filed the instant habeas-corpus petition in the United States District Court for the Middle District of Pennsylvania, seeking to avoid retrial in Maine primarily on double-jeopardy grounds.[4] *See*

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[3]At oral argument on Jordan's motion his counsel clarified that Jordan had been sentenced to three years' straight time with no probation or restitution, and that Jordan's service of this sentence was "complete in all aspects" as of that time. Transcript, Motion Hearing, *State v. Jordan*, Criminal No. 94-1025 (Me. Super. Ct. Oct. 1, 1997) ("Hearing Transcript"), attached to Response, at 12.

[4]Since filing his habeas petition Jordan has twice requested and been granted a stay of retrial proceedings against him in Maine Superior Court. *See* Motions To Stay/Continue, etc., dated (continued...)

generally Petition. By order dated December 7, 1998 the Middle District of Pennsylvania transferred Jordan's habeas case to the District of Maine. Order, *Jordan v. Mendez*, Civil No. 98-1932 (M.D. Pa. Dec. 7, 1998) (Docket No. 1(d)). The State of Maine was ordered to answer, which it did on January 25, 1999. Order to Answer (Docket No. 2); Response. Jordan appealed the decision of the Middle District of Pennsylvania to transfer his case — an appeal dismissed by the United States Court of Appeals for the Third Circuit on June 22, 1999 for lack of jurisdiction on the ground that transfer orders are not immediately appealable. Order, *Jordan v. Warden*, Civil No. 99-7003 (3rd Cir. June 22, 1999).

As of May 4, 1999 Jordan had been released from federal custody in Allenwood and was residing with his mother in South Portland, Maine. *See* Motion To Stay/Continue, etc., dated May 4, 1999, *State v. Jordan*, Criminal No. 94-1025 (Me. Super. Ct.), attached to Leadbetter Letter, at 1. On August 26, 1999 the Maine Superior Court issued a bail bond and conditions of release in connection with Jordan's retrial on the reckless-conduct charge. *See* Bail Bond and Conditions of Release, *State v. Jordan,* Criminal No. 94-1025 (Me. Super. Ct.), Attachment A to State of Maine's Supplemental Memorandum ("Supplemental Response") (Docket No. 13). Jordan's conditions of release included a promise to pay $5,000 in the event he should fail to appear in Superior Court as required; the necessity to report weekly by telephone to the Portland Police Department; and a promise to notify the court of any change of address. *Id*.

II. Discussion

In the habeas context, "the essential statutory ingredient for initial jurisdiction" is that the

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[4](...continued)
December 14, 1998 and May 4, 1999, *State v. Jordan,* Criminal No. 94-1025 (Me. Super. Ct.), attached to Leadbetter Letter, & endorsements thereto.

petitioner be held in "custody." *Fernos-Lopez v. Figarella Lopez*, 929 F.2d 20, 23 (1st Cir. 1991) (citation and internal quotation marks omitted); *see also* 28 U.S.C. § 2241(c)(3) ("The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States."); 28 U.S.C. § 2254(a) ("The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). A petitioner's custody status, for jurisdictional purposes, is determined as of the date the habeas petition is first filed. *Lopez*, 929 F.2d at 23.

In view of the fact that Jordan already had served his full state-court sentence as of the time of the filing of his habeas petition, I directed the parties to file supplemental memoranda addressing the power of the court to hear this case. Letter from Susan L. Hall, Case Manager, to All Counsel of Record dated September 10, 1999.[5] With the benefit of those responses, I now conclude that as of the date of filing of the instant petition (November 30, 1998) Jordan was not in the custody of the State of Maine with respect to the charge upon which he seeks to avoid retrial. The petition accordingly must be dismissed for lack of subject-matter jurisdiction.

Jordan as of November 30, 1998 faced the prospect of retrial on the reckless-conduct charge. The State had made clear on the record its desire to retry Jordan (albeit without seeking any increase in the length of his already-served sentence), Hearing Transcript, attached to Response, at 12-13, and the Superior Court had noted its intention to place the case on its trial list, Superior Court Docket,

[5]Although the State in its Response did not question whether Jordan was in "custody" for jurisdictional purposes, the court may raise *sua sponte* issues that affect subject-matter jurisdiction. *See, e.g., Swan v. Sohio Oil Co.*, 766 F. Supp. 18, 21 n.5 (D. Me. 1991).

entry of November 20, 1998.[6] However, the State never issued a detainer against Jordan during the period of his incarceration at Allenwood on unrelated federal charges. Supplemental Response at 4; *see generally* Superior Court Docket.

A person who, like Jordan, seeks to challenge impending charges via a habeas petition while imprisoned on an unrelated conviction is considered to be in "custody" for purposes of the habeas petition if subject to both an indictment and a detainer with respect to the impending charges. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 489 n.4 (1973). However, the Supreme Court expressly left open the question whether an indictment, standing alone, would suffice. *Id.* The parties point to no case, nor can I find any, in which this precise question ever has been answered. The First Circuit nonetheless has suggested in dictum that the existence of an outstanding arrest warrant is not in itself sufficient to constitute "custody" for purposes of the maintenance of a habeas petition. *Lopez*, 929 F.2d at 24; *see also Lefkowitz v. Fair*, 816 F.2d 17, 19 (1st Cir. 1987) (despite broadening of "custody" concept, "one constant has not changed over time: he who seeks the succor of habeas corpus must be subject then and there to 'restraints not shared by the public generally' . . . and 'at the least, to some type of continuing governmental supervision.'") (citations omitted).

Inasmuch as the prospect of physical custody is more imminent for a person subject to an outstanding arrest warrant (or by analogy, to a detainer) than to an indictment alone, it is unlikely that the First Circuit would consider the mere existence of an indictment sufficient to comprise "custody" for habeas purposes. *See Lopez*, 929 F.2d at 23-24 (noting that prospect of "imminent" or "inevitable" custody presents basis upon which habeas jurisdiction may be established in absence

[6]The Law Court's decision of July 14, 1998 in *Jordan II* apparently had the effect of automatically reinstating Jordan's indictment on the reckless-conduct charge.

of actual physical custody at time of filing).

Jordan struggles to distinguish his case on grounds that while at Allenwood he was serving consecutive state and federal sentences and that in such circumstances continued incarceration on either sentence establishes the existence of "custody" for habeas purposes. Petitioner's Supplemental Memorandum of Law, etc. ("Supplemental Petition") (Docket No. 11) at 2 (citing *Garlotte v. Fordice*, 515 U.S. 39 (1995)). In *Garlotte* the petitioner had been sentenced to consecutive state-court sentences for possession with intent to distribute marijuana and for murder. *Garlotte*, 515 U.S. at 41. The Court ruled that although Garlotte had already fully served his sentence with respect to the marijuana conviction at the time he filed a habeas petition attacking it, he remained in "custody" because he continued to serve time on the consecutive murder sentences. *Id*. at 45-46. The Court noted that because the state itself aggregated the consecutive sentences for purposes of determining eligibility for release, invalidation of Garlotte's marijuana conviction would shorten the term of his incarceration. *Id*. at 46 n.5, 47.

Jordan contends that, like Garlotte, he suffered lengthened confinement on the federal charges as a result of the existence of the state charge. He asserts that his Maine indictment "lengthened his federal incarceration by c. three months, even after federal sentencing as the Bureau of Prisons recalculated his custody time and Petitioner lost credit for accrued good time and some concurrent pre-trial credit which had been previously awarded when certain portions of the state and federal sentences ran concurrently." Supplemental Petition at 3.

The record in Jordan's federal case reveals that pursuant to a judgment entered on April 4, 1996 he initially was sentenced to imprisonment for a total term of seventy-two months on charges of mail fraud, money laundering, income-tax evasion and filing a false income-tax return. Judgment

in a Criminal Case, *United States v. Jordan*, Criminal Nos. 94-51-01 & 95-48-01 (D. Me. April 4, 1996) ("Original Judgment") (Docket No. 90) at 1-2. This federal sentence was to be served concurrently with (rather than consecutively to) his term of state-court incarceration. *Id*. at 2. On April 29, 1997 the First Circuit vacated Jordan's convictions for income-tax evasion and filing a false income-tax return. *United States v. Jordan*, 112 F.3d 14 (1st Cir. 1997). Shortly afterwards, on May 15, 1997, the Law Court in *Jordan I* vacated Jordan's conviction on the state reckless-conduct charge. By amended judgment dated October 14, 1997 Jordan was resentenced on the federal mail-fraud and money-laundering charges alone to a total term of fifty-seven months, with credit to be given for any time spent in presentence detention. Amended Judgment in a Criminal Case, *United States v. Jordan*, Criminal No. 94-51-01 (D. Me. Oct. 14, 1997) (Docket No. 122) at 1-2.[7] The new sentence was neither concurrent with nor consecutive to any other sentence, *id*., most likely because the Law Court had vacated Jordan's state-court conviction and he had in any event, as of then, completed service of his entire sentence thereunder. At resentencing Jordan's criminal-history category was reduced from a IV to a III in light of the vacation of his state-court conviction by the Law Court. Resentencing Transcript at 24; Original Judgment at 6.

Thus, as of November 30, 1998 Jordan was serving a federal sentence that ran neither concurrently with nor consecutively to any other sentence. Further, Jordan's new federal sentence reflected the impact of the vacation of his state-court sentence — the very remedy sought by Garlotte

[7]The government chose not to re-prosecute Jordan on the vacated tax counts. *See* Transcript of Proceedings of October 3, 1997, *United States v. Jordan*, Criminal No. 94-51-P-H (D. Me.) ("Resentencing Transcript") (Docket No. 125), at 2. The court noted that, with respect to the calculation of credit for time served, "I leave that to the Bureau of Prisons to calculate. It's the appropriate method under Supreme Court precedent that the Bureau of Prisons will determine how the time served credit is assigned." *Id*. at 49.

in his habeas petition.[8] *Garlotte* accordingly is not controlling.

Under these circumstances, I conclude that the instant petition must be dismissed without prejudice to Jordan's ability to file a future habeas petition challenging the reckless-conduct charge. *See Lopez*, 929 F.2d at 25 (noting that petitioner "of course remains free to file a subsequent petition for habeas corpus should he again be incarcerated.").

III. Conclusion

For the foregoing reasons, I recommend that the petitioner's habeas corpus petition be **DISMISSED** without prejudice.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 27th day of September, 1999.

David M. Cohen
United States Magistrate Judge

[8]That Jordan might have grounds to quibble with the manner in which the Bureau of Prisons recalculated his time served following his resentencing would not alter this basic fact.